

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEANETTE ABOUELNOUR,

Plaintiff,

v.

JO ANNE BARNHART, Commissioner of
Social Security Administration,

Defendant.

CASE NO. C05-0328 JLR

REPORT AND
RECOMMENDATION

REPORT AND RECOMMENDATION

Plaintiff Jeanette Abouelnour appeals to the District Court from a final decision of the Commissioner of the Social Security Administration [the “Commissioner”] denying her application for disability insurance benefits under Title II and Supplemental Security Income disability benefits under Title XVI of the Social Security Act. For the reasons set forth below, it is recommended that the Court **REVERSE** the Commissioner’s decision and **REMAND** for an award of benefits.

I. PROCEDURAL HISTORY

Plaintiff applied for Supplemental Security Income disability benefits in June, 2001, alleging that she has been disabled since November 2, 2000, based upon Post Traumatic Stress Disorder (“PTSD”) and depression. Tr. 60. Plaintiff’s application was denied initially and on reconsideration. An administrative law judge (“ALJ”), Cheri Filion, conducted a hearing on

1 March 18, 2003, where Plaintiff testified, after appearing without counsel. Neither a medical
 2 expert nor a vocational expert testified. Tr. 394. On July 22, 2003, the ALJ issued a decision
 3 finding the Plaintiff not disabled at step four. Tr. 329-330. Plaintiff appealed to the Appeals
 4 Council which remanded the case for another hearing and a new decision. Tr 331-334. On
 5 January 22, 2004, the Plaintiff appeared and testified at the second hearing, along with
 6 C. Richard Johnson, M.D., a psychiatrist, and Anthony Newbauer, a vocational expert. On May
 7 24, 2004, the ALJ denied benefits finding her not disabled at step four. Tr. 26-27. After her
 8 subsequent appeal to the Appeals Council was denied on February 11, 2005, the ALJ's decision
 9 become final. Tr. 7. Plaintiff then filed her Complaint in this court.

10 II. THE PARTIES' POSITIONS

11 The Commissioner has conceded errors and argues for a sentence six remand
 12 proceedings. Dkt. No. 20. The Plaintiff seeks a sentence four remand and thus an award of
 13 benefits. Dkt. No. 21.

14 III. STANDARD OF REVIEW

15 This Court may set aside the Commissioner's denial of Social Security disability benefits
 16 when the ALJ's findings are based on legal error or are not supported by substantial evidence in
 17 the record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993).¹ The Commissioner

18
 19 ¹ The claimant bears the burden of proving she is disabled. *Meanel v. Apfel*, 172 F.3d
 20 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial
 21 gainful activity by reason of any medically determinable physical or mental impairment which can
 be expected to result in death or which has lasted or can be expected to last for a continuous
 period of not less than twelve months. 42 U.S.C. § 1382c (a)(3)(A) (1992 & Supp. 2001).

22 The Social Security regulations set out a five-step sequential evaluation process for
 determining whether a claimant is disabled within the meaning of the Social Security Act.
 23 See 20 C.F.R. § 416.920(b) (2001). First, the claimant must establish that she is not engaging in
 any substantial gainful activity at the time of application. Next, she must have a severe
 24 impairment. At step three, the Commissioner will determine whether the claimant's impairment
 meets or equals any of the listed impairments described in the regulations. See *id.* § (d). If the
 25 claimant's impairment neither meets nor equals one of the impairments listed in the regulations,
 the Commissioner evaluates the claimant's residual functional capacity and the physical and
 26 mental demands of the claimant's past relevant work. If she is not able to perform past relevant

has conceded that the ALJ erred. However, in considering a sentence four or sentence six remand, the court must decide when evidence should be credited and an immediate award of benefits directed.² The following test applies:

1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence; 2) there are no outstanding issues that must be resolved before a determination of disability can be made; and 3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Harmon v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000)(citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)).

IV. SUMMARY OF THE ALJ'S DECISION

Plaintiff was 52 years old at the time of her last ALJ hearing. Tr. 26-27, 311. Her education as a welder and certified nursing assistant are reflected in her past work which included employment as a janitor, packer, selector, iron worker, trimmer, telemarketer, receiver, certified nursing assistant and welder. Tr. 66, 69-76, 405, 456-457.

The ALJ determined that Abouelnour had not engaged in any substantial gainful activity since her alleged disability onset date. Tr. 26, Finding 2. At step two, she found that Abouelnour's severe impairments consisted of back pain post fusion, bi-polar disorder, PTSD and

work, the burden shifts to the Commissioner to show that she can perform some other work that exists in significant numbers in the national economy, taking into consideration the claimant's residual functional capacity, age, education, and work experience. *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the claimant is unable to perform other work, then she is found disabled

² The Supreme Court has held that the fourth and sixth sentences of 42 U.S.C. § 405(g) set forth the "exclusive methods" for remanding to the Commissioner. *See Shalala v. Schaefer*, 509 U.S. 292, 296 (1993) (citing *Melkonyan v. Sullivan*, 501 U.S. 89, 99-100 (1991)). Remands under the Social Security Act are, therefore, known as either "sentence four" or "sentence six" remands. A sentence four remand constitutes a final judgment by the district court on the merits of the case, thereby relinquishing jurisdiction of the case to the Commissioner. *See Schaefer*, 509 U.S. at 297. In contrast, when a court enters a sentence six remand it does not decide whether the Commissioner's decision is correct and retains jurisdiction pending further administrative proceedings. *See id.*; *Flores v. Shalala*, 49 F.3d 562, 568 (9th Cir. 1995) (quoting *Melkonyan*, 501 U.S. at 100).

1 a substance abuse addiction disorder. Tr. 26, Finding 3. At step three the ALJ further found
2 Plaintiff's substance abuse disorder met the Listings, but found with the disorder Plaintiff's
3 impairments did not met or equal any listing of impairment under the federal regulations. Tr. 26,
4 Finding 4. The ALJ determined Plaintiff's Residual Functional Capacity ("RFC") as being able to
5 perform medium level exertional physical work. Tr. 35, Finding 6. At step four, the ALJ found
6 Abouelnour had past work as a janitor, housekeeper and companion and that her past work did
7 not require performance of work-related activities precluded by her RFC. Tr. 26, Finding 7.

8 V. DISCUSSION

9 The Commissioner has conceded that the ALJ erred. The Commissioner, however, argues
10 that the appropriate remedy is to remand to: 1) further evaluate the medical evidence; 2) further
11 develop the record by re-contacting the medical expert to obtain clarification of the testimony
12 given at the hearing; 3) formulate a new RFC based upon the updated evidence; and 4) perform a
13 new step four and if necessary, step five analysis. By contrast, Plaintiff argues that the court
14 should award her benefits. In determining when evidence should be credited and an immediate
15 award of benefits directed, the court applies the following test:

- 16 1) the ALJ has failed to provide legally sufficient reasons for rejecting such
evidence;
- 17 2) there are no outstanding issues that must be resolved before a determination of
disability can be made; and 3) it is clear from the record that the ALJ would be
18 required to find the claimant disabled were such evidence credited.

19 *Harmon v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000)(citing *Smolen v. Chater*, 80 F.3d 1273,
20 1292 (9th Cir. 1996)).

21 Plaintiff argues in her reply brief that she has demonstrated that she is disabled based on
22 the existing record relying upon the testimony of Dr. Johnson. Dkt. 21. Dr Johnson, opined that
23 the Plaintiff is disabled by satisfying the Listing 12.04 and states that she would have difficulty
24 performing sustained work. This, Plaintiff argues, when credited as true results in a disability
25 finding. Finally, the Plaintiff argues that the Commissioner has not offered any specific reason
26 how Plaintiff failed to meet the Listing 12.04 ©, nor responded to Dr. Johnson's conclusion that

1 Plaintiff could not perform sustained work. Dkt. No. 21.

2 The Commissioner believes another hearing is necessary to have Dr. Johnson clarify his
3 opinion testimony which stated that the Plaintiff could “perform simple, repetitive tasks, and
4 would require a job that did not involve a lot of interaction with co-workers or supervisors. Dkt.
5 No 20. The Court has reviewed the testimony of the Dr. Johnson. He clearly states that the
6 Plaintiff meets the Listing with a diagnosis of Bi-polar Disease and Post Traumatic Stress
7 Disorder, 12.04 and 12.06, respectively. Tr. 450. While Dr. Johnson did state that the Plaintiff
8 was able to perform simple, repetitive tasks and would not be able to work in an environment
9 with the general public and needs more isolation and minimal interaction, he stated her *primary*
10 problem would be an ability to “persist.” Tr. 453-454. He concluded, “she would have difficulty
11 completing a normal work week and workday, keep up with the pace that is required for *whatever*
12 *the job task is.*” Tr. 454. (Emphasis added). These words do not give rise to unresolved issues
13 on disability, but rather show Dr. Johnson’s deductive reasoning that should have led the ALJ to
14 find disability. According, the Court finds that there are no unresolved issues requiring a sentence
15 six remand, thus, a sentence four remand is appropriate. The undersigned recommends reversal
16 for an award of benefits under Smolen, 80 F.3d 1292.

17 VI. CONCLUSION

18 This court finds that the Commissioner committed legal error and her decision is not
19 supported by substantial evidence. Based on the record evidence, the undersigned recommends
20 that the matter be reversed and an award of benefits be ordered.

21 DATED this day the 26, October , 2005.

22 

23 Monica J. Benton
24 United States Magistrate Judge
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